BEFORE THE STATE BOARD OF EQUALIZATION'

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
HARLAN R. AND ESTHER A. KESSEL)

Appearances:

For Appellants: Esther A. Kessel, in pro. per.

For Respondent: Paul J. Petrozzi Counsel

OPINION

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Harlan R. and Esther A. Kessel against a proposed assessment of additional personal income tax in the amount of $236.33 for the year 1967.

Appellants were residents of California in the late 1930's. Their parents still live here. They both went to high school and college in this state and were married here. Their two children were born here. Mr. Kessel was inducted into and discharged from the Navy in California. However, in late 1762 appellants were residing in New Jersey where they had lived for several years. At that time they decided to return to California because Mr. Kessel's parents had been

experiencing health problems. In December 1962, and January 1963, Mr. Kessel made several trips to California seeking employment. During those trips he stayed at his parents' home in San Francisco or in a hotel. In January 1963, he located a suitable position. He then rejoined his family in New Jersey where they wound up their affairs. In June 1963, the family moved to California and Mr. Kessel commenced his new employment. They have remained in California ever since.

Appellants computed their 1967 California personal income tax liability through the use of the income averaging method contained in sections 18241 through 18246 of the Revenue and Taxation Code. The year 1963 was included as one of the base years in the computations associated with income averaging. Respondent denied appellants this privilege on the basis that they were not residents of California during the entire base period and proposed an additional assessment. Appellants protested and their protest was denied. This appeal followed. In support of their position appellants contend that they have fulfilled the residency requirement for income averaging indirectly and that, in any event, the California residency requirement for income averaging is unconstitutional.

The first issue for determination is whether appellants were residents of California during the entire base Period for purposes of income averaging.

The provisions for income averaging provide that a taxpayer may, in any taxable year, average income for that year with income for the four preceding base years. (See Rev. & Tax. Code, §§18241-18246.) Section 18243, subdivision (b), of the Revenue and Taxation Code specifically requires that in order to be eligible for income averaging a taxpayer must he a resident for the computation year and for the entire base period. The term "computation year" means the taxable year for which the taxpayer chooses the benefits of income averaging and the term "base period" is defined as the four taxable years immediately preceding the computation -year. (Rev. & Tax. Code, § 18242, subd.(e), now subd. (d).) By this

method the income earned by the taxpayer during the base period years directly affects his tax liability for the computation year. Thus the residency requirement ensures that the entire base period income has been subject to taxation by California.

Section 17014 of the Revenue and Taxation Code defines "resident" as "[e]very individual who is in this State for other then a temporary or transitory purpose." Respondent's regulations provide:

> Whether or not the purpose for which an individual is in this State will be considered temporary or transitory in character will depend to a large extent upon the facts and circumstances, of each particular case. It can be stated generally, however, that if an individual is simply passing through this State on his way to another state or country, or is here for a brief rest or vacation, or to complete a particular transaction, or perform a particular contract, or fulfill a particular engagement, which will require his presence in this State for but a short period he is in this State for temporary or transitory purposes, and will not be a resident by virtue of his presence here, (Cal. Admin. Code, tit. 18, regs. 17014-17016(b).)

Appellants do not argue that they were residents during the entire year 1963 because of their physical presence in California. In fact, they readily admit that even Mr. Kessel was not physically present in California during the entire year. The rest of the family was present in California, at most, only seven months during that year. Rather, they base their argument on the fact of their previous California residency coupled with their intent to return and their -actual return to California. They also point out that they -have remained here ever since. From this they conclude that they should be considered residents for the entire year 1963.

It is clear that appellants became California residents sometime in June 1963. However, the fact is

that Mr. Kessel's temporary visits to complete a particular transaction, obtaining employment, have never been considered sufficient connections with California to constitute residency. (Cf. Whittell v. Franchise Tax Board, 231 Cal. App. 2d 278, 41 Cal. Rptr. 673; Cal. Admin. Code, tit. 18, regs. 17014-17016(b).) Notwithstanding Mrs. Kessel's able presentation at the hearing, it must be concluded that appellants, whatever their intentions, did not establish California residency until June 1963. Therefore, they were not residents during the entire base period for the purposes of income averaging.

Appellants next contend that the California residency requirement for income averaging deprives them of the equal protection of the laws guaranteed by the federal constitution. It is a well-established policy of this board to refrain from ruling on a constitutional question in an appeal involving a proposed assessment of additional tax. This policy is based upon the absence of any specific statutory authority which would allow the Franchise Tax Board to obtain judicial review of an unfavorable decision. (Appeal of Maryland Cup Corp., Cal. St. Bd. of Equal., March 23, 1970; Appeal of C. Pardee Erdman, Cal. St. Bd. of Equal., Feb. 18, 1970.) However, the identical question was presented to this board in a matter involving a claim for refund, a proceeding whereby the Franchise Tax Board is not prohibited from seeking judicial review of an unfavorable decision. (Appeal of Laurence E. Broniwitz, Cal. St. Bd. of Equal., Sept. 10, 1969.) In deciding Broniwitz, this board held that the residency requirement in question did not violate ordinary equal protection standards. Under the circumstances, we do not believe that the residency requirement for the privilege of income averaging infringes upon appellants' constitutional rights.

Appellants also urge that respondent should be bound by the fact that one of respondent's employees advised them that they were eligible for income averaging and because there was no specific mention of the residency requirement in the instructions accompanying their income tax return. Only in a most unusual situation, however,

will an estoppel be raised against the government in a tax case. The facts must be clear and the injustice great. Here there is no indication of detrimental reliance or injustice since appellant's inquiry was made long after 1963, the year for which residency is questioned. It is our opinion that the facts presented here are not sufficient to raise an estoppel against respondent. (Appeal of Lee J. and Charlotte Wojack, Cal. St. Bd. of Equal., March 22, 1971; Appeal of Esther Zoller, Cal. St. Bd. of Equal., Dec. 13, 1960.)

In line with the facts and conclusions set out above, it is our opinion that appellants were not residents of California for the entire base period and therefore were not entitled to average income for the period in question. Accordingly, respondent's determination in this matter must be sustained.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Harlan R. and Esther A. Kessel against a proposed assessment of additional personal income tax in the amount of $236.33 for the year 1967, be and the same is hereby sustained.

Done at Sacramento, California, this 27th day of March, 1973, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Secretary